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In the Supreme Court of Maine, Cumberland County, May, 1853.
In Equity.

THE INHABITANTS OF YARMOUTH *vs.* THE TRUSTEES OF THE SCHOOL
FUNDS IN NORTH YARMOUTH, ET ALS.

1. The distinction between public and private corporations, has reference to their powers, and the purposes of their creation. They are public when created for public purposes only, connected with the administration of the government, and when the interests and franchises are the exclusive property and domain of the government. All other corporations are private.
2. Over public corporations, the Legislature has power not limited by the Constitution, to impose such modifications and restraints as the general interests may require, without infringing private rights.
3. Grants and charters of private corporations, when accepted, assume the character and elements of contracts, from which rights and franchises may flow, but over which, without the consent of the corporation, the Legislature has no more control than over private rights of property, unless on the default of the corporation judicially established.
4. When incorporated, the trustees of funds for the use of schools in a town, constitute a private corporation; and that portion of an Act of the Legislature providing for the division of the same town, and an incorporation of a part of the territory into a separate town, which requires the trustees to divide the fund, (and pay over a portion of it to other trustees, who were to receive and appropriate it to the use of schools in the town then incorporated,) is in violation of private rights, and in conflict with the provision of the Constitution, which prohibits the Legislature from any law impairing the obligation of contracts, and is inoperative and void.¹

HOWARD, J.—The parties expressed a desire, at the argument, that this case might be heard and determined, as if free from technical difficulties. Yielding to their request, we pass the demurrers, to examine the general merits upon the bill and answers. The leading facts are not in controversy.

It seems that the town of North Yarmouth claimed a tract of land called the "School Farm," consisting of about two hundred acres, originally appropriated for the use of schools in that town. Whether this was a grant from the proprietors, or from the government, does not appear. By a special Act of the Legislature of Massachusetts, of March 3, 1806, certain inhabitants of that town were incorporated as "The Trustees of School Funds in the town

¹ See to the same point, *Plymouth vs. Jackson*, 15 Penn. St. R. 44.

of North Yarmouth ;” they and their successors to be and continue a body politic and corporate, by that name, forever ; and to have a common seal, with power to sue and to be sued, by that name. The act provided further, that the number of trustees should not be more than eleven, nor less than seven, and that they should fill all vacancies occurring in the Board, by death, resignation or otherwise, from the inhabitants of that town, and have power to remove any of their number who might become unfit from any cause, for discharging their duties as trustees. They were authorized and empowered, by the same act, to sell the “School Farm so called, consisting of two hundred acres, more or less, belonging to said town of North Yarmouth, which was originally appropriated for the use of schools, and to put out at interest the money arising from such sale, in manner hereinafter mentioned, and for that purpose, they were to “sell and convey in fee simple,” and place the proceeds on interest, and to invest the interest with the principal, until the annual income should be \$300, and then to apply that sum “towards the annual support of public schools in said town, to be appropriated among the several school districts in said town, in proportion to what they pay of town taxes. And it shall never be in the power of said town or trustees, to alter or alienate the appropriation of the fund.”

The trustees accepted the trust, conveyed the land, received the proceeds, and have had the exclusive possession and management of the funds. Whether the town assented, does not directly appear, but it may fairly be presumed, from their long acquiescence, and receiving the income under the provisions of the act without objection, that they assented to its passage. *Lanesborough v. Curtis*, 22 Pick. 320. The Act of 1821, providing for the incorporation of Cumberland, from a portion of North Yarmouth, and for a division of the school funds ; and the Act of 1829, authorizing the trustees to appropriate the income of the funds, before the annual amount was \$300, do not affect the principles of this decision.

We assume, then, that the trustees of the school funds in North Yarmouth, were legally incorporated, and that they have performed their duties according to the terms of their charter, in raising,

investing, managing, and in exclusively possessing and controlling the funds, in pursuance of the objects for which they were incorporated, until the passage of the act of incorporation of Yarmouth, (August 8, 1849, c. 264). This is admitted or assumed at the argument. Indeed, the complainants proceed upon this assumption.

The plaintiffs claim a portion of these school funds, according to the provisions of the 4th section of their act of incorporation. The defendants resist the claim, upon the ground that the funds were not within the control or direction of the legislature, and that the fourth section, which provides for the division of the funds, is unconstitutional and void. It is not pretended that either North Yarmouth or the trustees assented to the provisions of that section, but they seem to have resisted them throughout. Were they binding upon the trustees, and could the legislature authoritatively require them to divide the funds thus intrusted, and deliver them to others? This brings us to the consideration whether the trustees were constituted a public or a private corporation.

The distinction between public and private corporations has reference to their powers, and the purposes of their creation. They are public, when created for public purposes only, connected with the administration of the government, and where the "whole interests and franchises are the exclusive property and domain of the government itself." Over these, the legislature has power, not limited by the Constitution, to impose such modifications, extensions, or restraints as the general interests and public exigencies may require, without infringing private rights. All corporations, invested with subordinate powers, for public purposes, fall within this class, and are subject to legislative control. All other corporations are private. They exist by legislative grants, conferring powers, rights and privileges, for special purposes. These grants are essentially contracts, which the legislature cannot impair or change, without the consent of the corporation. Coke Lit. § 413; Vin. Abr. Corp. A. 2; *Phillips v. Bury*, 2 T. R. 346; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Allen v. McKeen*, 1 Sumner, 276; *The People v. Morris*, 13 Wend. 325; *Penobscot*

Boom Corp. v. Lamson, 16 Maine 224; Story Com. on Const. § 1385-1388; Angel & Ames on Corp. 9, 27, 28.

The fee of the "School Farm" was in the town of North Yarmouth, in trust for the use of schools, in 1806, when the Legislature of Massachusetts, by consent of those interested, as we must presume from their entire acquiescence, authorized the sale of the land, and the creation of a personal fund from the proceeds, by the trustees then incorporated, in trust for the same use. This fund was never in the town, but was vested, by the act, in the trustees, as a corporation, for the use mentioned, forever. They did not constitute a municipal or public corporation, although the object of its creation might have been a public benefit. Their charter was a grant from the State, partaking of the nature of a contract, which they accepted, and in which the government had no interest. This was a franchise which involved the right to possess and control property, and the right to perpetuate a corporate immortality. 2 Blackstone Comm. 37. Though springing from the grant, the franchise, and the rights flowing from it were no more subject to the control or interference of the legislature, than were private rights of property, unless on default of the corporation, judicially determined. 2 Kent. Comm. 306. *Trustees of the new Gloucester School Fund v. Bradbury*, 11 Maine, 118, is a case similar to this at bar, and directly in point. *Richardson v. Brown*, 6 Maine, 355; *Terrett v. Taylor*, 9 Cranch. 43; *Pawlet v. Clark*, 9 Cranch, 292.

The act relating to the separation of this State from Massachusetts, provides that "all grants of lands, *franchises, immunities, corporate or other rights*, &c., shall continue in full force," after Maine shall become a separate State. The first section of that act, embracing the provisions referred to, forms a part of our Constitution, Art. 10, § 5, condition 7; Acts of Massachusetts, June 19, 1819. The statute of this State, of February 19, 1831, c. 492, § 1, to which the Legislature of Massachusetts gave its consent, so far altered the terms and conditions of the act relating to the separation of the States, "that the trustees of any ministerial or school fund, incorporated by the Legislature of Massachusetts,

in any town within this State, shall have, hold and enjoy their powers and privileges, subject to be altered, restrained, extended or annulled, by the Legislature of Maine, with the *consent of such trustees, and of the town for whose benefit such fund was established.*" In this case, there was no consent.

It follows, that the "trustees of the school funds in North Yarmouth," constituted a private corporation; that they can hold and enjoy their rights and privileges under their charter, independent of legislative interference or control, except for causes which do not now appear; and that so much of the 4th section of the act to incorporate the town of Yarmouth, as provides for the division of "the school funds belonging to the town of North Yarmouth," is inoperative and void. The Constitution is imperative, that the *legislature shall pass no law impairing the obligation of contracts.* Const. of Maine, Art. 1, § 11; Const. U. S., Art. 1, § 10, clause 1.

This result renders further consideration of the merits, or of the objections, unimportant. The bill must be dismissed, with costs for defendants.

In New York Supreme Court, Monroe Special Term.

FREDERICK FOLLET vs. ELAM R. JEWETT AND THOMAS M. FOOTE.

1. The incongruous rule of the Courts of New York and other States, that a defendant in an action for slander or libel, might show, to rebut the presumption of malice, that he *believed* the charge when made to be true, but must not show anything *tending* to prove it true, traced to its origin in the case of *Underwood vs. Parks*, 2 Strange 1200.
2. The rule in *Underwood vs. Parks*, is shown not to be an original rule of the common law, but a departure therefrom, and a mere piece of judicial legislation. The defect in this legislation in excluding appropriate matter in mitigation, *because not pleaded*, without providing any mode in which it could be pleaded, exhibited. Also shown, how the matter was made still worse by the gratuitous adoption of another rule, viz: that pleading the truth of the charge in justification, was *conclusive* evidence of malice in the original publication.